No. 82-1554

In The

Supreme Court of the United States

October Term, 1982

CHARLES E. STRICKLAND, Superintendent, Florida State Prison; JIM SMITH, Attorney General of Florida, and LOUIE L. WAINWRIGHT, Secretary, Florida Department of Corrections,

Petitioners,

vs.

DAVID LEROY WASHINGTON,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Former Fifth Circuit (Unit B)

BRIEF AMICI CURIAE OF THE STATES OF ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, GEORGIA, HAWAII, IDAHO, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, AND WYOMING IN SUPPORT OF PETITIONERS

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The states noted above, by and through their respective Attorneys General (see Appendix), appear on behalf of their citizens and file this brief pursuant to Rule 36.4 of the Rules of this Court.

INTEREST OF AMICI CURIAE

As the chief legal officers of their respective states, these Attorneys General and States Attorneys often represent the correctional administrators of their states in federal habeas corpus actions initiated pursuant to 28 U. S. C. § 2254. Moreover, they have a vital interest in ensuring the integrity of the criminal justice process in their respective states. With ever-increasing frequency they must defend state criminal convictions in federal court against Sixth and Fourteenth Amendment allegations of ineffective assistance of counsel. For these reasons the amici have a substantial and continuing interest in the establishment of consistent and reasonable federal standards for application in cases involving claims of ineffective assistance of counsel.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Eleventh Circuit, sitting en banc, imposed new and unduly burdensome standards for evaluating claims of ineffective assistance of counsel in collateral proceedings by rejecting the sound reasoning of the Florida Supreme Court and the United States District Court, which had both reviewed and rejected the defendant's claim. This case demonstrates how state and federal courts have failed to establish reasonable and consistent methods of analyzing these claims absent further direction from this Court. The Court should adopt a standard that emphasizes the truth-seeking function of the trial by placing the burden of proof entirely on the defendant in collateral proceedings to prove that the acts or omissions of his counsel, which he alleges

to be ineffective, affected the outcome of his trial or the severity of his sentence.

ARGUMENT

I. Introduction

In this case the amici curiae seek the correct standard for federal court review of claims of ineffective assistance of counsel to be applied in collateral proceedings arising out of state court convictions. In light of the total exhaustion requirement of *Rose v. Lundy*, 455 U.S. 509 (1982), the analysis provided by this Court will bear on cases in which state courts have already reviewed and rejected claims of ineffective assistance of counsel. In many cases much time will have elapsed since the convictions. Because these claims are tardy and speculative, they threaten the integrity of our entire criminal justice system, raising the possibility that such claims will materialize in every case in which a conviction has occurred.

State courts should continue to be the primary forum for fair resolution of claims of ineffective assistance of counsel. The administration of criminal justice varies dramatically from state to state, simply because the states face criminal justice problems that vary dramatically with region, population, local economies, etc. A defendant who challenges the adequacy of his or her representation should bear the burden of showing that the claimed inadequacy affected the outcome of the trial. Just as this Court cannot be the final arbiter of every state criminal conviction, lower federal courts should not endure the responsibility of evaluating counsel's representation in every state court conviction according to a complex checklist that may ulti-

mately be relevant to the circumstances of only a fraction of cases.

In keeping with the goals of the criminal justice system this Court must recognize the efficacy of swift and certain adjudication of claims. The burden to provide finality in state criminal convictions rests first with the states, and depends upon comity between state and federal courts. Federal courts should not disturb state court rejections of a defendant's claims without, at the very least, an affirmative showing that the alleged ineffectiveness of counsel affected the outcome of the defendant's trial. The exhaustive review by state courts of federal claims entitles state courts to similar consideration by federal courts. The tide of federal habeas corpus actions denigrates the state judicial process, and threatens federal courts as well. In 1982, nearly 10,000 habeas corpus actions were filed in federal court. Want, *The Caseload Monster in the Federal Courts*, 69 A. B. A. J. 613 (1983).

In several landmark decisions this Court has addressed issues that relate to the requirement of counsel. These decisions have formed a context within which other courts have derived additional rules concerning counsel's performance. Provided herein is a review of several relevant cases, as well as a review of federal and state decisions on counsel's representation, all of which are a backdrop to the essence of the States' argument. This Court must devise a guide which emphasizes scrutiny of the defendant's culpability in place of analysis that simply puts the defense attorney on trial. To do otherwise is to invite "Monday morning quarterbacking" over a defense attorney's performance. The guide which this Court sets forth must

recognize that justice suffers when the state court trial is reduced to a preliminary step in the process of second-guessing a defense attorney's strategy in presenting a client's case.

II. The Right To Counsel

The Sixth Amendment states that, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U. S. Const. amend. VI. In *Powell v. Alabama*, 287 U. S. 45, 71 (1932), the Court held that the Constitution mandated an "effective appointment" of counsel in a capital case. In *Glasser v. U. S.*, 315 U. S. 60, 70 (1942), the Court held that the Sixth Amendment requires that the assistance of counsel in a federal court be "untrammelled" and "unimpaired" by the trial court. This Court later found a presumption of effectiveness of counsel that the evidence in *Michel v. Louisiana*, 350 U. S. 91, 101 (1955), did not overcome. The Court's observations evolved into a set of general rules that have been adopted by state and federal courts. They are:

> (1) all attorneys who are admitted as members of the bar are presumed to be competent, and are presumed to have acted competently in any given situation; (2) the fact that counsel was physically or mentally ill, aged, intoxicated, young or inexperienced, does not itself overcome the presumption of effectiveness; (3) such facts, however, may be combined with other evidence to establish a claim of ineffectiveness; (4) great deference is to be given to the attorneys in the area of trial strategy and trial tactics; (5) courts will not judge an attorney's performance on the basis of hindsight; and (6) effective representation

> does not mean that the lawyer has to be perfect or infallible, or that the defendant has to prevail. 5 Am. Jur. Proof of Facts 2D, Ineffective Assistance of Counsel § 4 (1975).

Gideon v. Wainwright, 372 U. S. 335 (1963), held that the Sixth Amendment guarantee was a fundamental right essential to a fair trial and binding on the states by virtue of the Fourteenth Amendment.

In *McMann v. Richardson*, 397 U. S. 759, 771 (1970), the Court discussed, in dicta, advice given by counsel. For the first time, the Court hinted at an objective standard which trial courts should strive to maintain. The Court commented that whether advice is competent:

> depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the *range of competence* demanded of attorneys in criminal cases. On the one hand, uncertainty is inherent in predicting court decisions; but on the other hand defendants facing felony charges are entitled to the effective assistance of competent counsel. Beyond this *we think the matter, for the most part, should be left to the good sense and discretion of the trial courts* with the admonition that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their court. (Emphasis added.)

The Court further stated, citing *Jackson v. Denno*, 378 U. S. 368 (1964), that a defendant alleging that he was incompetently advised by his attorney and seeking to make a collateral attack in a federal court on a guilty plea in a state court must demonstrate "gross error on

the part of counsel." *McMann*, 397 U.S. at 772. The right to counsel guaranteed by the Sixth Amendment was later extended to all cases in which a defendant may be imprisoned in *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972).

III. The Burden Of Proving Ineffective Assistance Of Counsel

A. The Federal Circuits.

This Court has not explicitly commented on the allocation of the burden of proof as to prejudice, nor has it applied the harmless error doctrine to ineffective assistance of counsel claims. The issue of allocation of the burden of proof has two separate parts, the showing of ineffectiveness and the showing of prejudice. All courts hold that the defendant must prove acts or omissions on the part of counsel which constitute the rendering of ineffective assistance. The circuits and state courts do not always agree, however, on which party bears the burden of proving whether, and to what extent, the criminal defendant was prejudiced by his counsel's representation. *See Kelly v. Warden, House of Corrections*, 701 F. 2d 311 (4th Cir. 1983), reh'g granted.

The First, Second, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and District of Columbia Circuits have expressly required the defendant to prove the prejudicial effects of his attorney's incompetent assistance. *United States v. Massaro*, 544 F. 2d 547, 551 (1st Cir. 1976), *cert. denied* 429 U.S. 1052 (1977); *United States v. Joyce*, 542 F. 2d 158, 160 (2d Cir. 1976); *Gray v. Lucas*, 677 F. 2d 1086 (5th Cir. 1982); *Fitzgerald v. Estelle*, 505 F. 2d 1334 (5th Cir. 1974); *Price v. Perini*, 520 F. 2d 807 (6th Cir. 1975),

cert. denied, 423 U.S. 950 (1975); *Matthews v. United States,* 518 F. 2d 1245 (7th Cir. 1975); *Cooper v. Fitzharris,* 586 F. 2d 1325 (9th Cir. 1978) (en banc), *cert. denied,* 440 U.S. 974 (1979); *United States v. Swallow,* 511 F. 2d 514 (10th Cir. 1975); *United States v. Decoster,* 624 F. 2d 196 (1979) (D.C. Cir.) (en banc), *cert. denied* 444 U.S. 944 (1979); *Stanley v. Zant,* 697 F. 2d 955 (11th Cir. 1983); *Cf. United States v. Cronic,* 675 F. 2d 1126 (10th Cir. 1982) (prejudice inferred from circumstances).

B. The States.

The majority of state courts which have addressed the issue place the burden of showing prejudice upon the defendant though the decisions do not always distinguish the burden of showing ineffectiveness from the burden of showing prejudice. *Lewis v. State,* Ala. Cr. App., 367 So. 2d 542 (1978); *Deason v. State,* 263 Ark. 56, 562 S.W. 2d 79 (1978), *cert. denied,* 439 U.S. 839; *State v. Watson,* 653 P. 2d 351, 355 (Ariz. 1982) (defendant must show counsel's ineffectiveness; state must then show harmlessness beyond a reasonable doubt); *People v. Pope,* 23 Cal. 3d 412, 425 Cal. Rptr. 732, 590 P. 2d 859 (1979); *People v. Myers,* 617 P. 2d 808 (Colo. 1980); *Gentry v. Warden, Conn. Correctional Institution,* 167 Conn. 639, 356 A. 2d 902, 906 (1975); *Knight v. State,* 394 So. 2d 997 (Fla. 1981); *Raymond v. State,* 146 Ga. App. 452, 246 S.E. 2d 461 (1978); *State v. Antone,* 615 P. 2d 101 (Hawaii, 1980); *State v. McKenney,* 101 Idaho 149, 609 P. 2d 1140 (1980); *People v. Greer,* 79 Ill. 2d 103 (1980); *Chandler v. State,* 261 Ind. 161, 300 N.E. 2d 877 (1973); *Sims v. State,* 295 N.W. 2d 420 (Iowa, 1980); *State v. Pencek,* 224 Kan. 725, 585 P. 2d 1052 (1978); *True v. State,* No. 82-297 (Me. 1983); *Lang v.*

Murch, 438 A. 2d 914 (Me. 1981); *Davis v. State*, 40 Md. App. 467, 391 A. 2d 872 (1978); *Commonwealth v. Schlieff*, 5 Mass. App. 665, 369 N. E. 2d 723 (1977); *State v. Powless*, 272 N. W. 2d 258 (Minn. 1978); *Callahan v. State*, 426 So. 2d 801 (Miss. 1983); *Burroughs v. State*, 590 S. W. 2d 695 (Mo. App. 1979); *State v. Rose*, 608 P. 2d 1074 (Mont. 1980); *Lenz v. State*, 97 Nev. 65, 624 P. 2d 15 (1981); *State v. Lang*, 202 Neb. 9, 272 N. W. 2d 775 (1978); *People v. Moore*, 56 App. Div. 2d 877, 392 N. Y. S. 2d 321 (2d Dept., 1977); *State v. Kroeplin*, 266 N. W. 2d 537 (N. D. 1978); *State v. McGuinty*, 97 N. M. 360, 639 P. 2d 1214 (1982); *State v. Lytle*, 48 Ohio St. 2d 391, 358 N. E. 2d 623 (1976); *Kelsey v. State*, 569 P. 2d 1028 (Okla. Crim. 1977); *Rook v. Cupp*, 18 Or. App. 608, 526 P. 2d 605 (1974); *Commonwealth v. Bundridge*, 268 Pa. Super. 1, 407 A. 2d 406 (1979); *State v. Desroches*, 110 R. I. 497, 293 A. 2d 913 (1972); *Kibler v. State*, 267 S. C. 250, 227 S. E. 2d 199 (1976); *State v. McBride*, 296 N. W. 2d 551 (S. D. 1980); *Codianna v. Morris*, 660 P. 2d 1101 (Utah, 1983); *In Re Kasper*, 451 A. 2d 1125, 1126 (Vt. 1982); *State v. Hess*, 12 Wash. App. 787, 532 P. 2d 1173, *affirmed* as qualified on other grounds, 86 Wash. 2d 51, 541 P. 2d 1222 (1975); *State ex rel. Wine v. Bordenkircher*, 230 S. E. 2d 747 (W. Va. 1976); *Spilman v. State*, 633 P. 2d 183 (Wyo. 1981); *Fernandez v. United States*, 375 A. 2d 484 (D. C. App. 1977).

IV. Federal Court Analysis Of Ineffective Assistance Claims

In the past, the Circuit Courts have rarely distinguished direct appeals from collateral attacks in analyzing claims of ineffective assistance of counsel. Instead, they have simply evaluated the targeted acts or omissions

of counsel in light of various nebulous and subjective standards of performance. The standards they apply can be broken down into two basic categories. The first standard is "farce or mockery of justice," a standard still employed in the Second Circuit. *United States v. Bubar*, 567 F. 2d 192, 202 (2d Cir. 1977), *cert. denied*, 434 U. S. 872 (1977). Once commonly utilized, this standard has been supplanted by a number of variations of the second standard, "range of competence." This standard evolved from the Court's inquiry in *McMann v. Richardson*, 397 U. S. 759, 771 (1970), concerning whether defense counsel's "advice was within the range of competence demanded of attorneys in criminal cases." *See also Tollett v. Henderson*, 411 U. S. 258 (1973).

Following *McMann*, the First, Third, Fourth, Seventh and Eighth Circuits adopted "range of competence" standards derived from the *McMann* language. The First and Fourth Circuits asked whether counsel's performance was "within the range of competence expected of attorneys in criminal cases." *United States v. Bosch*, 584 F. 2d 1113, 1121 (1st Cir. 1978); *Marzullo v. Maryland*, 561 F. 2d 540, 543 (4th Cir. 1977), *cert. denied*, 435 U. S. 1011 (1978) (en banc as to adoption of *McMann* standard). The Third Circuit adopted a tort standard, applied to professionals in general, which focuses on "the exercise of the customary skill and knowledge which normally prevails at the time and place." *Moore v. United States*, 432 F. 2d 730, 736 (3d Cir. 1970) (en banc).

Another variation of the "range of competence" standard, adopted by the Seventh Circuit, "guarantees a criminal defendant legal assistance which meets a minimum standard of professional representation." *United States*

ex rel. Williams v. Twomey, 510 F. 2d 634, 641 (7th Cir. 1975), *cert. denied sub nom. Sielaff v. Williams*, 423 U. S. 876 (1977). The Eighth Circuit requires that trial counsel "exercise the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." *United States v. Malone*, 558 F. 2d 435, 438 (8th Cir. 1977).

Another formulation of the second standard that is frequently used requires that counsel's representation be "reasonably effective." The "reasonably effective" standard also evolved from the language in *McMann v. Richardson*, 397 U. S. 759, 771 (1970), stating that defendants are entitled to the "effective assistance of competent counsel." The "reasonably effective" standard is used in the First, Fifth, Sixth, Ninth, Tenth, Eleventh and D. C. Circuits. The First Circuit held in *United States v. Bosch*, 584 F. 2d 1113, 1121 (1st Cir. 1978), that it is sufficient if counsel is prepared and conducts the defense with reasonable knowledge and skill and with an exercise of knowledgeable choices of trial tactics. The First Circuit, therefore, applies both the "range of competence" and "reasonably effective" standards.

The Fifth and Sixth Circuits ask "whether counsel was reasonably likely to render and did render reasonably effective counsel." *Gray v. Lucas*, 677 F. 2d 1086 (5th Cir. 1982); *United States v. Gray*, 565 F. 2d 881, 887 (5th Cir. 1976); *United States v. Toney*, 527 F. 2d 716, 720 (6th Cir. 1975), *cert. denied*, 429 U. S. 838 (1976). The Ninth Circuit states that a defendant must be afforded "reasonably competent and effective defense representation." *Cooper v. Fitzharris*, 586 F. 2d 1325, 1328 (9th Cir. 1978) (en banc), *cert. denied*, 440 U. S. 974 (1979). The

reasonable competence and reasonably effective representation tests are also used in the Tenth and Eleventh Circuits. *Dyer v. Crisp*, 613 F. 2d 275, 278 (10th Cir. 1980); *Mylar v. Alabama*, 671 F. 2d 1299, 1300 (11th Cir. 1982).

A few courts have attempted to use "specific guidelines" as a basis for evaluating claims of ineffective assistance. The guidelines define acceptable conduct of counsel at trial as well as what conduct is required both before and after trial. The Fourth Circuit adopted this standard in *Coles v. Peyton*, 389 F. 2d 224 (4th Cir. 1968), *cert. denied*, 393 U. S. 849 (1968), holding that counsel for an indigent defendant should be appointed promptly, must be afforded reasonable opportunity to prepare a defense, must confer with his client without undue delay and as often as necessary to advise him of his rights and ascertain available and unavailable defenses, and must conduct appropriate factual and legal investigations. In a later decision, *Marzullo v. Maryland*, 561 F. 2d 540 (4th Cir. 1977), the Fourth Circuit adopted the *McMann* standard, without expressly overruling *Coles v. Peyton*. In *U. S. v. Decoster*, 624 F. 2d 196 (D. C. Cir. 1976), the Court rejected the specific guidelines approach advocated by Judge Bazelon in his dissenting opinion.

In the instant case, the Eleventh Circuit has attempted to graft a clumsy, convoluted checklist approach onto their analysis in an attempt to give their rationale the appearance of a more objective process. What the analysis accomplishes, however, is to shift the focus even further from the question of the fairness of the defendant's trial, which is exactly where the focus should remain.

This variety of approaches bears out Justice White's remarks to the Criminal Justice Section of the American

Bar Association last year, in which he noted that the frame of reference for analyzing counsel's conduct is not settled. Nor, he said, is it clear whether prejudice or a likelihood of prejudice must be shown, or indeed "what prejudice" might be in a case of counsel ineffectiveness. *Reports and Proposals*, 31 CRIM. L. REP. (BNA) 2469.

At the present time, the standards for determining error are so broad that the requirement of showing prejudice may be the only part of the analysis that is ultimately useful. In the same vein, prejudice affecting the outcome is the only determination that can be objectively and consistently determined.

> . . . ineffective assistance of counsel claims require a different analysis by reviewing courts than the other sixth amendment cases. In most sixth amendment cases, the reviewing court is presented with an objective problem: either counsel was appointed and allowed to confer with his client or not. The basis of the claim of ineffective assistance, however, requires a more detailed and difficult examination of counsel's efforts and abilities in a specific factual situation. This necessarily amorphous inquiry into counsel's effectiveness calls for demonstration of actual prejudice to the defendant in order to provide relief only in warranted circumstances.

Case Comment, *Decoster III: New Issues in Ineffective Assistance of Counsel*, 70 J. CRIM. L. 275, 287 (1980).

V. Appropriate Standards Of Review

This case presents the Court with the opportunity to resolve the analytical nightmare created by the failure of lower courts to objectify and apply the *McMann* dicta. The Court must recognize the collateral nature of these proceedings and apply the appropriate standards of re-

view utilized in its recent decisions. In *Cupp v. Naughten*, 414 U. S. 141, 144 (1973), the Court granted certiorari to consider whether the giving of a certain jury instruction "so offended established notions of due process as to deprive the respondent of a *constitutionally fair trial.*" (Emphasis added.) The Court stated:

> Before a federal court may overturn a conviction resulting from a state trial in which this instruction was used, it must be established not merely that the instruction is undesirable, erroneous, or even "universally condemned," but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment.

414 U. S. at 146. Criticizing the analysis employed by the Court of Appeals, the Court went on to say that the lower court's analysis put the "cart before the horse."

> . . . the question is not whether the trial court failed to isolate and cure a particular ailing instruction, but rather whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.

414 U. S. at 147.

Likewise, lower courts often put the cart before the horse when analyzing claims of ineffective assistance of counsel by quibbling about the advisability of a particular action or omission of defense counsel rather than focusing on the question of whether the alleged error "so infected the entire trial that the resulting conviction violates due process." Moreover, they often fail to heed the Court's admonition in *McNabb v. U. S.*, 318 U. S. 332, 340 (1943):

> It must be remembered that review by this Court of state action expressing its notion of what will best

> further its own security in the administration of criminal justice demands appropriate respect for the deliberative judgment of a state in so basic an exercise of its jurisdiction.

This respect for the deliberative judgments of state courts is vital to the effective administration of the criminal justice system.

As this Court stated in *United States v. Agurs*, 427 U. S. 97, 112 (1976), the "overriding concern" is the "justice of the finding of guilt," and, therefore, postconviction relief is warranted only where the defendant is arguably innocent. *See also Hankerson v. North Carolina*, 432 U. S. 233, 239 (1977) (the purpose of the burden of proof is "to prevent the erroneous conviction of innocent persons"); *Stone v. Powell*, 428 U. S. 465, 490 (1976) ("[T]he ultimate question of guilt or innocence . . . should be the central concern of a criminal proceeding").

In *Agurs*, 427 U. S. 97, the defendant alleged that the prosecution's failure to tender criminal records of the victim deprived her of a fair trial as guaranteed by the Due Process Clause of the Fifth Amendment. The Court held that the proper standard of materiality on review by that Court in determining whether *constitutional* error had been committed was whether the omitted evidence created a reasonable doubt of guilt, an *outcome determinative* standard of review. The Court stated that the Court of Appeals had incorrectly interpreted the constitutional requirement of due process. The Court cited *Mooney v. Holohan*, 294 U. S. 103 (1935), where the Court held that in order to justify a *collateral* attack on petitioner's conviction, the petitioner must establish *fundamental unfairness*, i. e., reasonable likelihood that the *outcome* was af-

fected. *Agurs*, 427 U.S. at 103. The Court also illustrated this underlying principle by citing *Brady v. Maryland*, 373 U.S. 83 (1963), stating:

> A fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the *outcome* of the trial. (Emphasis added.)

Agurs, 427 U.S. at 104. The *Brady* Court focused on harm to the defendant, stating:

> We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment. . . .

Brady v. Maryland, 373 U.S. at 87. The *Agurs* Court stated that it was concerned with "elementary fairness," *Agurs*, 427 U.S. at 110.

> The mere *possibility* that an item of undisclosed information *might* have helped the defense, or *might* have affected the outcome of the trial, does not establish "materiality" in the *constitutional* sense. (Emphasis added.)

Agurs, 427 U.S. at 109-110. The Court stated that its overriding concern was with the justice of the finding of guilt and that its frame of reference was, therefore, to the context of the entire record. 427 U.S. at 112.

In an even more recent decision involving a collateral attack, *Henderson v. Kibbe*, 431 U.S. 145 (1977), the Court rejected the suggestion that the omission of an instruction on causation "so infected the entire trial that the resulting conviction violated due process." The Court also stated:

> The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal. The question in such a collateral proceeding is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process," [citation omitted], not merely whether "the instruction is undesirable, erroneous, or even 'universally condemned'."

431 U.S. at 154. This Court elaborated on the rationale for so holding by stating in an accompanying footnote:

> The strong interest in preserving the finality of judgments, *see, e.g., Blackledge v. Allison*, 431 U.S. 63 (Powell, J., concurring); *Schneckloth v. Bustamonte*, 412 U.S. 218, 256-266 (Powell, J., concurring), as well as the interest in orderly trial procedure, must be overcome before collateral attack can be justified. For a collateral attack may be made many years after the conviction when it may be impossible, as a practical matter, to conduct retrial.

Similar concerns should be recognized in the instant case.

In *Smith v. Phillips*, 455 U.S. 209 (1982), this Court, citing *Brady*, noted that the touchstone of due process analysis is the fairness of the trial. The Court also held that in a federal habeas action, the findings of the trial judge are presumptively correct under 28 U.S.C. § 2254 (d). The Court cited the holding of *Sumner v. Mata*, 449 U.S. 539, 551 (1981), that "federal courts in such proceedings must not disturb the findings of state courts unless the federal habeas court articulates some basis for disarming such findings of the statutory presumption that they are correct and may be overcome only by convincing evidence." 455 U.S. at 218. The *Smith* Court also cited

Chandler v. Florida, 449 U. S. 570, 582-83 (1982), for the principle that "[f]ederal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension."

In *United States v. Frady*, 456 U. S. 152 (1982), the defendant alleged prejudice from a faulty jury instruction. This Court determined the appropriate standard of review and allocation of the burden of proof in a collateral proceeding requires that the defendant "clear a significantly higher hurdle than would exist on direct appeal." 456 U. S. at 166.

The Court reiterated its emphasis that the error must be evaluated in the *total context* of the events at trial. *Frady*, 456 U. S. at 169. The *Frady* Court also stated that it was the *defendant* who had to shoulder the burden of showing not merely that the errors created a *possibility* of prejudice, but that they worked to his *actual* (Court's emphasis) and substantial disadvantage, infecting his entire trial with error of constitutional dimension. 456 U. S. at 170. The Court indicated that there must be a "substantial likelihood" that the outcome would have been affected "to overcome society's justified interests in the finality of criminal judgments." 456 U. S. at 175.

In *Engle v. Isaac*, 456 U. S. 107 (1982), the defendant asserted the unconstitutionality of a rule placing the burden of proving an affirmative defense on criminal defendants. The Court stated "we have long recognized, however, that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim." 456 U. S. at 134.

The defendant in *United States v. Valenzuela-Bernal*, 102 S. Ct. 3440 (1982), alleged that he was denied due process or the Sixth Amendment right of confrontation because of the deportation of some alien witnesses. The Court held:

> Due process guarantees that a criminal defendant will be treated with "that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial."

102 S. Ct. at 3449.

CONCLUSION

In evaluating claims of ineffective assistance of counsel, courts must remember:

> The purpose of the court is to seek the truth in a manner which provides fundamental fairness to all parties, both the defendant and society. Reliance on theoretical flaws in this truth-seeking process which have no real world consequences defeats the purpose for which the court was created and does a disservice to all parties involved.

Comment, *Ineffective Assistance of Counsel: Who Bears the Burden of Proof?*, 29 BAYLOR L. REV. 29, 48 (1977).

By adhering to the principles of its recent decisions involving collateral attacks, the Court will further restore balance to our federal system, the loss of which has generated so much concern in recent years:

> Conviction in the state courts now has become merely the starting point of interminable litigation. State appeals are followed by successive petitions for fed-

> eral habeas corpus and successive federal appeals. What is involved is a repetitious, indefinite, costly process of judicial screening, rescreening, sifting, resifting, examining and re-examining of state criminal judgments for possible constitutional error. . . . No other nation in the world has so little confidence in its judicial system as to tolerate these collateral attacks on criminal court judgments.

Coub, "The Case Against Modern Federal Habeas Corpus," 57 A. B. A. J. 323, 326 (1971).

The cost of relitigating claims of ineffective assistance of counsel in federal court is great. Narrowing the instances in which the federal courts may discard the reasoned judgments of our state courts with respect to an issue involving so many subjective elements will help restore the public confidence on which the system depends.

The decision of the court below should be reversed and the case remanded for reconsideration of the petitioner's claim of ineffective assistance of counsel under a standard whereby petitioner is required to prove that the actions or omissions of his counsel affected the outcome of his trial or the severity of his sentence.

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